A. *Brockett* And *Jopes* Impose Strict Liability Upon A Common Carrier For Intentional Torts Committed By Its Servants Against Passengers

In *Brockett*, a case involving a passenger assault by the ship's watchman, this Court addressed for the first time the issue concerning the proper standard of care to be imposed upon a common carrier for its servants' misconduct against passengers. In holding the shipowner strictly liable for the crew member's assault of the passenger, this Court stated:

> [A] common carrier is bound, as far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers and co-passengers, and *undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract* [for safe transportation].

121 U.S. at 645-46 (emphasis supplied).[2]

Four years later, in *Jopes*, the Court reaffirmed its prior *Brockett* holding that a carrier is absolutely bound to ensure

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2. In holding that a carrier has a duty "absolutely to protect its passengers" from the misconduct of its servants and describing that rule to be "peculiar" between common carriers and their passengers, this Court did not intend to limit that rule to acts performed within the servant's scope of employment. Otherwise, there would be nothing peculiar about a common carrier's absolute responsibility if it were confined by the scope of employment concepts. *See, e.g., Sutton*, 7 F.2d at 580 (relying upon *Brockett* for proposition that "scope of employment" is not required for imposition of strict liability upon common carrier); *THE MINNETONKA*, 146 F. at 513 (after quoting *Brockett* stating that "archaic doctrine that the moment a servant of a carrier commits a wanton assault upon a passenger he acts outside of the scope of his authority" had been renounced).

that its own servants do not unlawfully assault or injure a passenger:

> While a carrier does not insure his passengers against every conceivable danger, *he is held absolutely to agree that his own servants engaged in transporting the passenger shall commit no wrongful act against him. . . . Recent cases state this liability in the broadest and strongest language* . . . it may be said that the carrier is liable for every conceivable wrongful act done to a passenger by its train hands and other employes *while they are engaged in transporting him, no matter how willful and malicious the act may be, or how plainly it may be apparent from its nature that it could not have been done in furtherance of the carrier's business.*

142 U.S. at 26 (citations omitted) (emphasis supplied). In this Court's view, the application of this stringent standard of care was necessary because of the special relationship that exists between a common carrier and its passenger:

> *[O]wing to the peculiar circumstances which surround the carrying of passengers*, as stated, *a more stringent rule of liability has been cast upon the employer; and he has been held liable although the assault was wanton and willful, and outside the scope of the employment.* Noticeable instances of this kind are the cases of Craker v. Chicago & Northwestern Railway, 36 Wisconsin 657, in which, when a conductor had forcibly kissed a lady passenger, the company was held responsible for the unlawful assault; and Goddard v. Grand Trunk Railway, 57 Maine 202, in which, when a brakeman had committed a gross and

> offensive assault upon an invalid passenger, the company was held liable in damages.

142 U.S. at 27 (emphasis supplied).

Thus in *Brockett* and *Jopes*, this Court articulated the rule of law that imposes strict liability upon a common carrier, such as Petitioners, for assaults or other intentional torts perpetrated by their servants against passengers. The *Brockett-Jopes* rule has never been overruled or modified; certainly not by *Kermarec*. As the Eleventh Circuit correctly stated "*Brockett* and *Jopes* represent the current state of the controlling federal law as to crew member assaults on passengers." (App. at 35a-36a; 44a).

Respondent has never suggested that under *Brockett* and *Jopes* a common carrier is "an absolute insurer" of the safety of its passengers. Nor has any Circuit Court that has considered the subject issue ever asserted such. Petitioners' argument to the contrary raises a false issue. Indeed, *Brockett* and *Jopes* reject the notion that a common carrier is an "insurer" of the safety of its passengers. *See, e.g., Jopes*, 142 U.S. at 26 ("While a carrier *does not insure his passenger against every conceivable danger*, he is held absolutely to agree that his own servant engaged in transporting the passenger shall commit no wrongful act against him") (emphasis supplied). Rather, under *Brockett* and *Jopes*, the imposition of strict liability upon a common carrier for crew member misconduct on passengers rests upon the "peculiar" circumstances that surround the transportation of passengers. As a result of this special relationship between a common carrier and its passenger, the carrier is "held absolutely to agree that his *own servants* engaged in transporting the passenger *shall commit no wrongful act* against him." *Id.* (Emphasis supplied). Accordingly, the strict liability standard enunciated in *Brockett* and *Jopes*, while embracing a broad

and sound policy, nevertheless has an extremely narrow application; it applies in only those situations where a *passenger* is injured by the *willful misconduct* of *a common carrier's servants* during *the course of the voyage*.[3]

Brockett and *Jopes* have withstood the test of time, remaining undisturbed for well over a century and providing uniformity to admiralty law to this very date. In 1926 and again in 1993, in two cases involving the imposition of strict liability upon ocean carriers because of crew member sexual assaults on passengers brought before the Ninth Circuit, this Court denied *certiorari*. *Sutton*, 269 U.S. 586 (1926); *Morton*, 510 U.S. 907 (1993). The instant petition should be met with the same response this Court provided to the maritime carriers in *Sutton* and *Morton*: it should be denied.

B. The Eleventh Circuit's Decision Is In Harmony With The Decisions Of Other Federal Circuits That Have Squarely Addressed The Issue Concerning The Proper Standard Of Care To Be Imposed Upon A Common Carrier For Its Servants' Intentional Torts Against Passengers

All Circuit decisions which have directly confronted the instant issue have followed *Brockett* and *Jopes* and applied a strict liability standard against the common carrier for the misconduct of its servants against passengers. *THE MINNETONKA*, 146 F. 509; *Willsie*, 224 F. 908; *Sutton*, 7 F.2d 579; *Pullman*, 46 F.2d 399; *Matthews*, 157 F.2d 609; *Tullis*, 397 F.2d 22; *Muratore*, 845 F.2d 347; *Morton*, 984 F.2d 289; *Gilstrap*, 998 F.2d 559; *Doe*, 394 F.3d 891. The Eleventh Circuit, after "navigat[ing] through considerable precedent about the duty of common carriers to protect and

3. As will be discussed, *infra*, Petitioners' suggestion that the *Jopes*' strict liability language is *dictum* ignores over a century of precedent in the Circuit Courts following that decision.

safely transport their passengers and common carriers' corresponding liability for crew member assaults," rejected Petitioners' argument that there was a split in the Circuits on this issue. (App. at 24a-25a; 35a-36a; 40a-41a). Moreover, Federal Circuit Court jurisprudence for some one hundred fifteen years debunks Petitioners' baseless argument that the Eleventh Circuit decision in this case and the Ninth Circuit's 1993 decision in *Morton* are isolated events, establishing a "category" of their own. The simple truth is that those decisions are the most recent reaffirmations of a uniform principle of maritime law enunciated by this Court in *Brockett* and *Jopes* and recognized for over a century in courts throughout the nation.

1. First Circuit

In *Muratore*, the First Circuit followed the *Brockett-Jopes* rule concerning the issue of crew member intentional torts affecting passengers and the common carrier's liability for such misconduct. (*See also* App. 40a-41a). The First Circuit, confronting the issue of whether the harassment by crew photographers of a passenger subjected the cruise line defendant to liability, ruled that "a maritime carrier has an unconditional responsibility for the misconduct of its people toward passengers." 845 F.2d at 353. The *Muratore* Court, relied upon, *inter alia*, the opinion of the renowned admiralty scholars Gilmore and Black. *Id.* These scholars, in turn, cited this Court's holding in *Brockett* for the proposition that admiralty law recognizes the application of different standards of care concerning injuries suffered by passengers in slip and fall cases and those suffered as a result of the willful misconduct of a ship's servants:

> The subject of liability to passengers for [personal] injury may be summarily handled here, as the principles involved differ little from those

> in use ashore. The liability basis is negligence; there is no "insurer" relation and no "warranty" . . . (*The only apparent exception is the unconditional responsibility of the carrier for misconduct of his people toward the passengers. See New Jersey Steamboat Co. v. Brockett*, 127 U.S. 637 (1887)). (Emphasis supplied).

G. Gilmore and C.L. Black, *The Law of Admiralty*, § 1-10 at 23 n.77 (2d ed. The Foundation Press 1975). (*See also* App. at 41a-42a n.27). The Eleventh Circuit, therefore, correctly concluded that the First Circuit follows the absolute liability rule articulated by *Brockett and Jopes*.[4] (App. 41a-42a).

2. Second Circuit

The Second Circuit also follows the *Brockett-Jopes* continuum of precedent. *THE MINNETONKA*, 146 F. 509. (*See also* App. at 42a-43a). Conspicuously absent from Petitioners' discussion is *THE MINNETONKA* decision which is the controlling Second Circuit precedent on the subject issue. Therein, the Second Circuit, in a decision issued fifteen years after *Brockett* and *Jopes*, acknowledged that the proper standard of care applicable to common carriers, as articulated by this Court, for the intentional misconduct of their servants affecting passengers was that of strict liability, regardless of whether that misconduct occurred within the scope of employment. 146 F. at 513.

In *THE MINNETONKA*, the shipowner had been found liable for the theft of a passenger's jewelry by one of the ship's crewmembers. In affirming the lower court's ruling, and citing

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4. Just last year, the United States District Court for the District of Maine, on the basis of *Jopes*, *Morton* and *Muratore*, held that a cruise line is "[unconditionally] liable for the intentional torts of its crew members." *Peterson v. Scotia Prince Cruises, Ltd.*, 328 F. Supp. 2d 119, 122 (D. Me. 2004).

Brockett, the Second Circuit held that, "[t]he liability of the vessel for the willful torts of its own servants committed upon a passenger during the voyage is well established." 146 F. at 513. The Second Circuit went on to add:

> The *archaic doctrine* that the moment a servant of a carrier commits a wanton assault upon a passenger he acts outside of the scope of his authority and thus releases his employer from liability was long ago renounced by the great preponderance of authority . . . By the defendant's contract with the plaintiff, it had undertaken to carry him safely and to treat him respectfully; *and while a common carrier does not undertake to insure against injury from every possible danger, he does undertake to protect the passenger against any injury arising from the negligence or willful misconduct of its servants* while engaged in performing a duty which the carrier owes to the passenger.

146 F. at 513 (emphasis supplied).[5]

THE MINNETONKA decision has not been overruled, either expressly or *sub silentio*, by the Second Circuit. Petitioners' argument that *Compagnie Generale Transatlantique v. Rivers*, 211 F. 294 (2d Cir.), *cert. denied*, 232 U.S. 727 (1914), abandoned the rule that a common carrier is absolutely liable for crew member assaults on passengers is belied by a careful analysis of that decision.[6]

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5. Petitioners' position comes down to the proposition that what was an "archaic doctrine" in the nineteenth century is now the modern trend in admiralty jurisprudence.

6. Such analysis is critical, for Petitioners rely heavily on *Rivers* for the false proposition that a split of authority exists among the Circuits. While the District Court in this case shared the flawed perception of a "split" among the Circuits, Petitioners' same argument was properly rejected by the Eleventh Circuit. (App. at 40a-43a).

In *Rivers*, a passenger was attacked at night by the ship's watchman. After a jury verdict in favor of the passenger, the cruise ship defendant appealed. One of the issues on appeal was whether the district court had given appropriate jury instructions. The Second Circuit ruled that the district court had interpreted the issue "most favorably" to the shipowner by applying a negligence standard. In fact, the Second Circuit acknowledged, citing *Jopes* and *THE MINNETONKA*, that the jury instructions concerning the standard of care applicable to passenger assault claims had been less stringent than the applicable precedent indicated. The Second Circuit affirmed the judgment in *Rivers* simply because, although the district court had improperly permitted the application of a less stringent standard of care, the evidence at trial demonstrated that the shipowner was still liable to the passenger *even under the lower negligence standard*. This reasoning clearly follows from the fact that the *Rivers* Court cited *Jopes* with approval.

Further, *Rivers*' reliance upon *THE MINNETONKA*, decided in 1906, which, as discussed, applied a strict liability standard upon a shipowner for a crew member's misconduct against passengers, confirms that the *Rivers* Court nowhere approved the application of a negligence standard to situations where a carrier's servant perpetrates an intentional tort against a passenger. As previously noted, *THE MINNETONKA* expressly cited *Brockett* and rejected the notion that a shipowner could escape responsibility to its passengers by claiming that the servant's conduct was outside his or her scope of employment. *Id.*

Given that *Rivers* cited both *Jopes* and *THE MINNETONKA* with approval, it is inconceivable that the *Rivers* Court intended to contravene this Court's express

holding.[7] The controlling Second Circuit precedent follows the *Brockett-Jopes* rule requiring the imposition of strict liability upon a common carrier for the intentional torts of its servants against its passengers.

3. Ninth Circuit

The Ninth Circuit first squarely addressed the subject issue in a 1925 decision. *Sutton*, 7 F.2d 579. There, the plaintiff, a fifteen year old girl, was raped by two of the vessel's crew members. The Ninth Circuit, citing *inter alia Brockett*, reiterated the following strict liability standard:

> [The carrier] by the act of employment vouched for his [the crew member's] deportment during the voyage. A carrier owes a duty to every passenger to protect him from insult and assault. It is a part of the contract of carriage. * * * As long as respondent was a passenger on appellant's ship, appellant owed him a duty of absolute protection from the assaults and aggressions of its servants, and the rule is well nigh universal that the carrier cannot plead as a defense

7. Petitioners' reliance upon two decisions from the United States District Court for the Southern District of New York for the proposition that *Rivers* requires application of a negligence standard in crew member assaults on passengers is misplaced. *York v. Commodore Cruise Line, Ltd.*, 863 F. Supp. 159 (S.D.N.Y. 1994); *Jaffess v. Home Lines, Inc.*, No. 85-7365, 1988 U.S. Dist. LEXIS 3481 (S.D.N.Y. April 22, 1988). Those decisions contravene this Court's holdings in *Brockett* and *Jopes*, and for this reason alone should be disregarded by this Court. (In fact, neither decision mentions *Brockett* or *Jopes*). Also, those decisions contravene controlling Second Circuit precedent. (In fact, neither decision acknowledges *THE MINNETONKA*). In *Morton*, the Ninth Circuit aptly criticized the New York district court's reliance upon, *inter alia*, *Rivers* to apply a negligence standard in the context of passenger assaults by the ship's crew. 984 F.2d at 292. *Jaffess* and *York* are the product of flawed reasoning at the district court level.

> that the servant acted outside the scope of his employment.

7 F.2d at 580 (citations omitted).

More recently, the Ninth Circuit had the opportunity to reaffirm the legal continuum initiated by *Brockett* and *Jopes* concerning the unconditional liability of the common carriers for the willful misconduct of its servants upon passengers. *Morton*, 984 F.2d 289.

In *Morton*, a passenger was also raped by a crew member of the cruise ship. The Ninth Circuit forcefully reiterated the stringent duty of care applicable to common carriers in the context of crewmembers' wanton assaults against passengers:

> Unlike the invitee/licensee distinction [rejecting an identical *Kermarec* argument made by the cruise line], *the rule regarding absolute liability for crew members' assaults* cannot be traced to obsolete concepts regarding real property and concepts of feudalism. Rather, *it is a widely adopted rule that common carriers owe such an absolute duty to their passengers.* A leading torts treatise explains the general rule: Where the deliberate or willful wrong was not done to further the master's business the tendency has been to deny vicarious liability, but here too there have been many qualifications. The relationship between master and plaintiff may be such as to put on the master a duty of protective care that he may not delegate. Thus a carrier is liable to its passengers for assaults by employees prompted by purely personal motives.

984 F.2d at 292 (emphasis supplied) (citations omitted).

Accordingly, the Ninth Circuit has made it explicitly clear that a common carrier is strictly liable for intentional torts of its servants against its passengers in accordance with the *Brockett-Jopes* rule.

This Court denied *certiorari* in both *Sutton* and *Morton*.

4. Fifth Circuit

The Fifth Circuit has also addressed the issue of a common carrier's strict liability for crew misconduct against passengers. *Tullis*, 397 F.2d at 23. In *Tullis*, the Fifth Circuit observed that admiralty law recognized two separate standards of care, namely, negligence and strict liability, and that strict liability was applicable in adjudicating passenger claims for crew member torts:

> The principles involving liability to passengers differ little from those in use ashore. The liability basis is negligence *with the only apparent exception being the unconditional responsibility of the carrier for the misconduct of the crew toward the passengers.*

Id. (Emphasis supplied). (*See also* App. at 36a). Accordingly, the Fifth Circuit has explicitly recognized the *Brockett-Jopes* rule as being the applicable standard concerning crew member misconduct against passengers.[8]

8. The District Court in this case, while applying the *Brockett-Jopes* standard of care, mistakenly discerned a conflict between the Fifth Circuit and other Circuits concerning the issue of whether the common carrier servant's conduct had to be within the scope of employment before the strict liability standard attached. This perception was based on the Fifth Circuit's decision in *Jackson Marine Corp. v. BLUE FOX*, 845 F.2d 1307 (5th Cir. 1988); but the Eleventh Circuit rejected the notion that *Jackson Marine* (Cont'd)

5. Eighth, Fourth and District of Columbia Circuits

Also illustrating the universal rule that a common carrier is absolutely liable for intentional torts of its servants against passengers are the decisions from the Eighth, Fourth and District of Columbia Circuits. *Gilstrap*, 998 F.2d 559; *Willsie*, 224 F. 908; *Pullman*, 46 F.2d 399; *Matthews*, 157 F.2d 609. (*See also* App. at 30a-31a n.16).

In *Gilstrap*, an Amtrak passenger alleged that she had been sexually assaulted by a train employee while traveling from California to North Dakota. Although *Gilstrap* involved the interpretation of Washington State law, the Eighth Circuit cited with approval "maritime common carrier" decisions in addressing the issue of the correct liability standard to apply. The Eighth Circuit particularly noted a Washington Supreme Court decision, *Marks v. Alaska Steamship Co.*, 71 Wash. 167 (1912), imposing strict liability upon a shipowner for a passenger assault by a crew member. The *Marks* Court held that a passenger had the right to claim "absolute protection" from the shipowner against the assaults and violence of its servants. 71 Wash. at 169.

It is noteworthy that in reaffirming the universal rule of common carrier liability for assaults of its servants against its passengers, the *Marks* court discussed two of the precedents relied upon by this Court in *Jopes*, namely, *Goddard v. Trunk Railway*, 57 Me. 202 (Me. 1869) and *Craker v. Chicago & N.W.R. Co.*, 36 Wis. 657 (Wis. 1875). The *Gilstrap* Court also considered "persuasive authority" the Ninth Circuit's decisions in *Sutton* and *Morton* discussed above. 998 F.2d at 562.

(Cont'd)

was applicable to a cruise line's liability for crew member misconduct against passengers: "*Jackson Marine* is even more inapposite as it involved fraud by a salvage boat captain against the owner of a damaged ship, and in no way involved a common carrier or a passenger." (App. at 41a n.26).

See also Willsie, 224 F. at 911 (*citing, inter alia, Brockett* and *Jopes* for proposition that carrier is liable for "willful and malicious acts of [its] agents, and even though such acts are not done within the scope of their employment").

Further, as the Eleventh Circuit noted, the Fourth Circuit and the District of Columbia Circuit also join with other Circuits in concluding that a common carrier is strictly liable for the intentional torts of its servants against passengers. (App. at 30a-31a n.16, citing the *Pullman* and *Matthews* decisions). In *Pullman*, the Fourth Circuit observed that in cases involving the willful misconduct of a carrier's servants upon passengers, "there may be recovery of actual damages arising from the wrongful act of the servant, notwithstanding such act was beyond the line of duty and the scope of employment and was never ratified by the master." 46 F.2d at 399. Similarly, in *Matthews*, the District of Columbia Circuit, citing *Brockett*, remarked that "[a] common carrier is required to protect its passengers against assault or interference with the peaceful completion of their journey." 157 F.2d at 610-11.

The foregoing analysis confirms that all Federal Circuits that have squarely addressed the issue of the proper standard to apply to intentional torts of common carriers' servants against passengers have followed a rule long ago enunciated by this Court in *Brockett* and *Jopes*.

Petitioners have not presented to this Court *any* authority in which a Circuit Court has refused to apply a strict liability standard in the narrow situation involving the willful misconduct of a common carrier's servants against passengers. Indeed, they cannot. The uninterrupted continuum of authority flowing from the *Brockett* and *Jopes* decisions over the course of some one hundred fifteen years represents the very essence of uniformity required by admiralty law. Accordingly, there is no reason for this Court to review the subject decision which is simply the latest step in that continuum. The petition should be denied.

II. *Kermarec* Is Inapplicable And The Circuits That Have Applied The *Kermarec* Negligence Standard Have Done So Only In Slip And Fall Situations Not To Claims Brought By Passengers For Intentional Torts Perpetrated By A Common Carrier's Servants

Petitioners' reliance upon *Kermarec* is misplaced and the Eleventh Circuit properly held that *Kermarec*, a slip and fall case not involving a passenger, is inapplicable in the context of common carrier liability for the intentional misconduct of its servants against passengers. (App. at 33a-34a).

Kermarec does not apply for various reasons: *Kermarec* had nothing to do with a passenger (App. at 33a); *Kermarec* did not involve an assault upon a passenger by a servant of the common carrier (App. at 34a); *Kermarec* was a garden variety slip and fall case where plaintiff sustained injuries allegedly due to the condition of the ship (App. at 33a-34a,); and *Kermarec* did not discuss either *Brockett* or *Jopes*. As the Eleventh Circuit accurately concluded, "[q]uite simply, there is no indication in *Kermarec* that the Supreme Court intended to eliminate the more stringent rule in *Jopes* imposing liability on a common carrier for its employees' assaults of passengers." (App. at 34a).

That *Kermarec* did not change or eliminate absolute carrier liability for the intentional torts of crew members against passengers is confirmed by the fact that the precedents relied upon by this Court in *Kermarec* were limited to non-intentional personal injury cases. This was so because the narrow issue in *Kermarec*, as stated by this Court, was "whether admiralty recognizes the same distinctions between an invitee and licensee as does the common law." 358 U.S. at 630. After considering this narrow issue, the Court then went on to state that admiralty law need not import the land-

based common law distinctions between "invitees" and "licensees" and concluded "that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Id.* at 632. (*See also* App. at 33a-34a). *Kermarec* merely set forth a minimum standard of care for maritime personal injury cases.

Indeed, *Kermarec* expressly recognized that the minimum duty of care owed by a shipowner to everyone was not universal and that greater duties were owed to persons holding status in various "meaningful categories." While rejecting the old common law distinctions between invitee, licensees and trespasser, this Court observed in a footnote:

> This is not to say that concepts of status are not relevant in the law of maritime torts, but only that the meaningful categories are quite different. Membership in the ship's company, for example, a status that confers an absolute right to a seaworthy ship, is peculiar to the law of the sea. Such status has now been extended to others aboard "doing a seaman's work and incurring seaman's hazards."

358 U.S. at 632 n.9 (citations omitted).

This Court's reference in *Kermarec* to the status of a seamen as an "example" of those "meaningful categories" persuasively demonstrates that the Court did not intend to abolish the long-established precedent of *Brockett* and *Jopes* that a common carrier owes a passenger an absolute right of protection against the misconduct of the carrier's servants, whether or not the misconduct took place outside the scope of employment.

The Ninth Circuit and the Eleventh Circuit agree.

The Ninth Circuit in *Morton*, like the Eleventh Circuit in this case, explicitly rejected the very same argument advanced here by Petitioners that *Kermarec* applies in the context of crew member assaults on passengers. 984 F.2d at 291-92. The Ninth Circuit, citing footnote 9 in *Kermarec*, rejected the notion that *Kermarec* had imposed a universal standard of care regardless of the status of the individual onboard:

> In that note, the Court makes clear that "reasonable care under the circumstances" is not the universal standard of care to be provided aboard ship. A different standard may apply where it makes sense under maritime law.

984 F.2d at 291. In *Morton*, this Court denied *certiorari*.

All of the Circuit Court cases applying the *Kermarec* negligence standard cited in the petition have done so only in the context of passengers suing for damages sustained from either slip and fall or garden variety negligence type injuries rather than in the context of injuries sustained by passengers from the assaults of crew members. *Muratore*, 845 F.2d 347 (applying *Kermarec* standard to passenger's damages for personal injury due to fall, but affirming "unconditional responsibility" for that portion of lawsuit involving liability for separate "misconduct" of crew members); *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169 (2d Cir. 1983) (passenger tripped over stool left on dance floor); *Monteleone v. Bahamas Cruise Line, Inc.*, 838 F.2d 63 (2d Cir. 1988) (plaintiff suffered injuries when she fell down a flight of stairs onboard ship); *Pastore v. Taiyo Gyogyo, K.K.*, 571 F.2d 777 (3d Cir. 1978) (fireman fighting fire onboard vessel injured when falling off ladder); *Beard v. Norwegian Caribbean*

Lines, 900 F.2d 71 (6th Cir. 1990) (passenger injured while playing basketball on the ship's deck); *Urian v. Milstead*, 473 F.2d 948 (8th Cir. 1973) (passenger injured while disembarking from yacht); *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir. 1984) (passengers sued for damages sustained when cruise ship's sanitary system failed).[9]

Although *Kermarec* was handed down over forty-five years ago, Petitioners cannot point to a single Federal Circuit Court that has embraced the argument they advance here; an argument that has been squarely rejected twice in the last twelve years by the Ninth and Eleventh Circuits. On the contrary, even after *Kermarec*, the First (1988), the Fifth (1968), the Eighth (1993), the Ninth (1993) and the Eleventh (2004) Circuits have unambiguously recognized that a common carrier has an unconditional responsibility for intentional torts perpetrated by their servants against passengers. *Muratore*, 845 F.2d 347; *Tullis*, 397 F.2d 22; *Gilstrap*, 998 F.2d 559; *Morton*, 984 F.2d 289; *Doe*, 394 F.3d 891.

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9. Petitioners' reliance on three state cases, which purportedly represent the "modern trend" in admiralty law, is unavailing. *Adams v. New York City Transit Auth.*, 88 N.Y.2d 116 (N.Y. 1996); *Lowrey v. Montgomery Kone, Inc.*, 42 P.3d 621 (Ariz. Ct. App. 2002); *Sebastian v. District of Columbia*, 636 A.2d 958, 962 (D.C. 1994). *Lowrey* involves personal injuries, not intentional torts; *Sebastian*, a case involving a sexual assault by an ambulance attendant, relies purely on District of Columbia law in refusing to apply common carrier doctrine while recognizing that many other state jurisdictions do adhere to that doctrine and apply a strict liability standard; and *Adams*, a case involving an assault perpetrated by a token booth clerk, incorrectly relies on *Kermarec* to justify applying a negligence standard. These decisions contravene admiralty law, are clearly inapposite and/or are the product of flawed reasoning. Viewed properly in the context of the above discussion, they are aberrations and certainly do not constitute "modern maritime law."

Brockett-Jopes and their progeny and *Kermarec* and its progeny constitute two separate branches of admiralty authority that govern separate and distinct issues concerning the duties owed by shipowners to persons onboard their vessels. On the one hand, there is the branch embodied by the *Brockett-Jopes* rule, a strict liability standard for intentional misconduct by servants of common carriers against passengers, the standard of care that Federal Circuits have invariably applied for well over a century. On the other hand, the *Kermarec* rule applies a negligence standard to garden variety maritime personal injury cases, which occur far more frequently. [10] For such negligence cases, which can involve any person on a vessel, not necessarily a passenger, and any type of carrier, not necessarily a common carrier, it is the minimum standard of care (reasonable under the circumstances) that has been consistently applied. Under the principle of *stare decisis*, both branches represent uniformity in the administration of admiralty law, albeit under separate continuums of precedent involving very different issues and types of cases.

Given the inapplicability of *Kermarec* to the present case and the existence of the requisite uniformity in cases such as this one involving intentional torts of common carriers' servants against passengers, no reason exists for this Court to review the Eleventh Circuit's well-reasoned decision.

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10. Thus, Petitioners' recitation of statistics concerning "marine personal injuries" is simply irrelevant, for the instant case involves the commission of an intentional tort perpetrated by a crew member against a passenger.

III. The Public Policy Embodied In *Brockett* And *Jopes* Has Represented Uniformity In Admiralty Law For Well Over A Century And Requires No Review

The *Brockett-Jopes* rule is sound as a matter of policy. The public policy reasoning behind the imposition of the highest standard of care upon a common carrier is that a common carrier assumes an extraordinary undertaking vis-à-vis its passengers, namely, the safe transportation of a passenger to destination free of the willful misconduct of the common carrier's servants. *Brockett*, 121 U.S. 637; *Jopes*, 142 U.S. 18. As the Eleventh Circuit recognized,

> the rationale for imposing strict liability on the common carrier employer is *the carrier-passenger relationship and the corresponding existence of an implied duty of protection and safe transport free from assaults by the carrier's employees during transit.* In terms of tort liability, this becomes in effect, a special non-delegable duty owed by the carrier to the passenger.

(App. at 31a) (Emphasis supplied) (App. 31a-33a n.18-20). *See also Morton*, 984 F.2d at 291 ("contract of carriage made it the duty of the carrier to carry safely and to protect its passenger from violence and insult committed by its own servants") (*quoting Sutton*, 7 F.2d at 580); *St. Michelle v. Catania*, 252 Md. 647, 651 (Md. Ct. App. 1969) ("common carrier is not an insurer of the safety of its passengers, but it is bound to employ the highest degree of care for their safety, consistent with the nature of the undertaking"). (*See* App. at 28a-29a n.13).

In the twilight of the twentieth century and at the dawn of the new millennium, the Ninth and Eleventh Circuits, in separate cases involving sexual assaults by crew members

on passengers, have reaffirmed the vitality of a universal standard that has remained undisturbed for well over one hundred fifteen years as well as the public policy that supports it. Petitioners have provided no reasonable basis which would warrant a review by this Court. Petitioners can do no better than to suggest that the policy has become outdated because certain modes of transportation are "safer" today that they were in the past, which fails to address the core concern of willful misconduct of a common carrier's servants against passengers, as the plaintiff in this very case can attest.

Indeed, there is an element of trust inherent in the common carrier-passenger relationship. That trust is violated when a common carrier's servant commits an intentional tort against its passenger and it is this breach which gives rise to the imposition of the strict liability standard. It is therefore manifest that the purpose of the policy embodied by the *Brockett-Jopes* rule is *not* to protect against natural hazards of certain types of traveling, but rather, to apply an appropriate standard in the event of a breach of the trust created by the common carrier-passenger relationship.

The element of trust is particularly compelling under the facts of the present case. It is clear that Respondent sought the assistance of a crew member (Aydin) precisely because she viewed him as part of the crew and trusted him to offer assistance in her moment of need. As the Eleventh Circuit noted:

> Aydin undisputedly had offered to help Doe in her distress. Aydin even referred to Doe as "his passenger," and there is ample evidence in the record that Doe allowed Aydin to escort her only because he was trusted as her waiter-crew member on the ship.

(App. at 46a; *see also* App. at 13a). Had that element of trust not existed, Respondent would not have accepted Aydin's

proffered assistance and she would not have become the victim of his sexual battery. (App. at 46a).

Accordingly, the sound policy which has been universally applied for over a century in narrow circumstances involving egregious breaches of trust requires no review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The Supreme Court of the United States

CELEBRITY CRUISES, INC., ZENITH SHIPPING CORP., APOLLO SHIP CHANDLERS, INC., AND CELEBRITY CATERING SERVICES PARTNERSHIP,

Petitioners,

v.

JANE DOE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION OF THE INTERNATIONAL COUNCIL OF CRUISE LINES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE INTERNATIONAL COUNCIL OF CRUISE LINES AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE INTERNATIONAL COUNCIL OF CRUISE LINES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI[1]

Pursuant to Supreme Court Rule 37.2(b), the International Council of Cruise Lines ("ICCL") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the Petition for Writ of Certiorari in this case. Petitioner has consented to the filing of this brief. However, Respondent has withheld consent necessitating the filing of this motion.

The ICCL is a non-profit trade association comprised of sixteen major passenger cruise lines and numerous "associate members" with interests related to the cruise line industry. In 2004, over eight million passengers embarked on cruises originating from United States ports of call.[2] This figure represents an increase of almost one million people over the number of passengers embarking in 2003.[3] The increases are expected and projected to continue with newly built ships entering the marketplace to accommodate the growing passenger base. As a unified voice for the competing lines that comprise this dynamic and growing industry, the ICCL is intent on fostering continued economic viability for all of its members and bringing light to the important issues facing those member cruise lines.

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[1] This motion for leave to file this brief as *amicus curiae* is filed simultaneously with the brief.

[2] Business Research & Economic Advisors (BREA), "The Contribution of the North American Cruise Industry to the U.S. Economy in 2004" (August 2005), available at http://www.iccl.org/resources/2004_economic_study.pdf (as of September 15, 2005).

[3] *See id.* at 3.

As a point of reference, in 2004, the North American cruise industry generated roughly $30 billion in total economic benefit for the United States.[4] This $30 billion economic impact supported the employment of more than 315,000 workers and in excess of $12 billion in paid wages and salaries throughout the United States.[5] Moreover, individual state economies benefited from over $14.7 billion worth of direct purchases made in conjunction with the North American cruise industry.[6] Corresponding with their positions as the leading points of embarkation for U.S. passengers, Florida, California and New York received the most economic benefit from the industry.

The ICCL, as an organization driven by the needs of its members, is an active participant in the regulatory and policy development process as it relates to, and impacts, the cruise line industry. The ICCL works directly with federal agencies and international organizations in an effort to ensure that the cruise industry is safe, secure, responsible, and reliable. With respect to domestic policy regulation and implementation, the ICCL coordinates with the U.S. Coast Guard, the Centers for Disease Control and Prevention, the U.S. Department of Agriculture, the U.S. Environmental Protection Agency and other agencies to ensure that its members are in compliance with United States laws, rules and regulations. On a global scale, the ICCL also works closely with the International Maritime Organization and the United Nations to assist its member

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[4] *See id.* at 32-33.

[5] *See id.*

[6] *See id.*

cruise lines in maintaining compliance with international treaties, conventions and protocol.

Because the ICCL represents such a large number of the most traveled cruise lines in the world, it has a direct interest in any final determination of the standard of care applied to a cruise line (employer) in the case of an assault on a passenger by a crewmember (employee). In addition, the ICCL's long history of working with domestic and foreign organizations in all avenues of regulation and policy-making adds to the unique perspective that the organization can provide to any debate on this subject. The ICCL believes that this Court is presented with a significant opportunity to resolve a question that currently confounds the industry. The opportunity presently exists for this Court to clarify the confusion and the conflict in its own precedent and the conflict between the Second Circuit Court of Appeals and both the Ninth and Eleventh Circuit Courts of Appeals.

The relevance of this split among the Circuit Courts of Appeal is particularly significant for the members of the ICCL. The current conflict among the appellate circuits represents increased cost and significant legal uncertainty to the ICCL's member cruise lines. The application of different standards of care in different appellate circuits encourages forum shopping on the part of potential plaintiffs, which is a costly waste of industry and judicial time and resources.

The ICCL believes that its member cruise lines should owe the same duty of care to any customer aboard a cruise vessel, regardless of where that passenger chooses to file suit. This is especially true considering that a lynchpin of the general maritime law, as articulated by this Court on

numerous occasions, is its uniformity across all courts, regardless of location. The unequal treatment of defendants (and plaintiffs) depending solely on where suits are filed is not justified. The unfair, unequal, and substantial economic impact on those cruise lines sued in circuits applying strict liability for assaults on passengers is further compounded when contrasted with the fact that their land-based competitors in the hotel, resort and amusement industries are only held to a standard of reasonable care.

For the stated reasons, the ICCL respectfully requests that this Court grant it leave to file the attached brief in support of the petition for writ of certiorari.

Respectfully submitted,

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QUESTION PRESENTED

WHETHER THE STANDARD OF CARE OWED BY A CRUISE LINE TO A PASSENGER ASSAULTED BY A CREWMEMBER IS REASONABLE CARE UNDER THE CIRCUMSTANCES OR STRICT LIABILITY?

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INTEREST OF *AMICUS CURIAE*[1]

The International Council of Cruise Lines ("ICCL") is a non-profit trade association comprised of sixteen major passenger cruise lines. In addition, the ICCL is comprised of over ninety "associate members," including 3M, American Bureau of Shipping (ABS), American International Group, Inc., Board of Commissioners of the Port of New Orleans, Canaveral Port Authority, Cargill Food Distribution Co., The Coca-Cola Company, Halifax Port Authority, Maine Port Authority, Maryland Port Administration, Massachusetts Port Authority, Port Everglades, Port of Galveston, Port of Houston Authority, The Port of Los Angeles, Port of Miami, The Port of Philadelphia and Camden, a DRPA of PA & NJ, Port of San Diego, Port of Seattle, Quebec Port Authority, and Tampa Port Authority.

The ICCL is an active participant in the regulatory and policy development process as it relates to, and impacts, the cruise line industry. Most importantly, the ICCL works closely with domestic and international authorities to ensure that cruising remains safe, secure, responsible, and reliable for all parties involved.

Because the ICCL is comprised of the sixteen major cruise lines accommodating a majority of the approximately eight million (and rising each year) passengers embarking annually on ships from U.S. ports of call, the ICCL has a significant interest in this Court's determination

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its member cruise lines, or its counsel made a monetary contribution to the preparation and submission of this brief.

of the standard of care owed by a cruise line to a passenger assaulted by the cruise line's employee.[2] Although the ICCL's member cruise lines compete in the marketplace for domestic and foreign leisure travelers, the ICCL acts as a unified and cohesive organization with respect to industry issues and policies. The ICCL has successfully advocated the unified position of its members, while cooperating with domestic and international governing authorities, in such significant areas as safety, public health, environmental responsibility, security, medical facilities, and passenger protection.[3]

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

Common Carrier Passenger Assault Cases at the Supreme Court

At a time when passenger vessels served primarily as a means of transporting people from one destination to another, this Court issued two decisions that address the standard of care owed by a "common carrier" to a passenger assaulted by the carrier's employee ("Passenger Assault Cases"). *New Jersey Steam-Boat Co. v. Brockett*,

[2] Business Research & Economic Advisors (BREA), "The Contribution of the North American Cruise Industry to the U.S. Economy in 2004" p. 7 (August 2005), *available at* http://www.iccl.org/resources/2004_economic_study.pdf (as of September 15, 2005) (finding that the ICCL's member cruise lines "accounted for approximately 62 percent of the North American industry's global fleet, 88 percent of the lower berth capacity and 93 percent of global passengers").

[3] http://www.iccl.org/whoweare/index.cfm (as of September 15, 2005).